Supreme Court, U.S.
FILED

93 1744 MAY 4 1994

OFFICE OF THE CLERK

No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

PAT CHOATE,
Petitioner,

v.

TRW, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

DALE A. COOTER *
DONNA S. MANGOLD
MARY M. BAKER
COOTER, MANGOLD, TOMPERT, & CHAPMAN, P.C.
2000 L Street, N.W.
Suite 200
Washington, D.C. 20036
(202) 289-5600
Attorneys for Petitioner
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

74

QUESTIONS PRESENTED

I. WHETHER CONFUSION EXISTS AMONG THE LOWER COURTS AS TO THE BURDEN PLACED ON THE MOVANT, AS WELL AS THE SUFFICIENCY OF THE OPPOSITION BY A NON-MOVANT TO WITHSTAND SUMMARY JUDGMENT?

II. WHETHER THE PROCEEDINGS BELOW RESULTED IN A PAPER TRIAL WHICH VIOLATED PETITIONER'S RIGHT TO A JURY TRIAL UNDER THE SEVENTH AMENDMENT?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are named in the caption to the Petition.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	6
I. CONFUSION EXISTS AMONG THE LOWER COURTS AS TO THE BURDEN PLACED ON THE MOVANT, AS WELL AS THE SUFFICIENCY OF THE OPPOSITION BY A NONMOVANT TO WITHSTAND SUMMARY JUDGMENT	6
A. The Divergent Approaches That Courts Have Utilized in Summary Judgment Cases Demonstrate Their Confusion	7
1. Some courts appear to be applying pretrilogy summary judgment standards	8
2. Some courts appear to apply a *Matsushita*-style approach to summary judgment	11
B. The Fact That the Courts Provide Little or No Explanation in Granting or Affirming Summary Judgment Shows Their Confusion and Fosters Uneven Application	14
II. THE PROCEEDINGS BELOW RESULTED IN A PAPER TRIAL WHICH VIOLATED PETITIONER'S RIGHT TO A JURY TRIAL UNDER THE SEVENTH AMENDMENT	18

TABLE OF CONTENTS—Continued

Page

A. The D.C. Circuit Applied the Trilogy Principles in Boilerplate Fashion in Derogation of Petitioner's Right to a Jury Trial 19

B. The Case Below Turned on Issues of Witness Credibility and Therefore Should Have Reached a Jury 22

CONCLUSION 24

APPENDIX A

February 4, 1994 Opinion of the United States Court of Appeals for the District of Columbia Circuit 1a

APPENDIX B

May 27, 1992 Order of the United States District Court for the District of Columbia entering summary judgment 8a

APPENDIX C

Initial Pretrial/Scheduling Order filed February 28, 1992 ..... 14a

APPENDIX D

Order filed October 21, 1991 ..... 18a

APPENDIX E

Affidavit of Pat Choate 19a

APPENDIX F

Excerpts from the Transcript of Proceedings 30a

APPENDIX G

Excerpts from Pat Choate's Deposition Transcript.. 35a

TABLE OF AUTHORITIES

CASES: Page

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) ..... 9, *passim*
Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) ..... 6, *passim*
Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc., 826 F.2d 1335 (3d Cir. 1987) 13
Barnes v. Southwest Forest Indus., 814 F.2d 607 (11th Cir. 1987) 10
Carrie v. United States Postal Serv., 812 F.2d 621 (10th Cir. 1987) 10
Carter v. Duncan-Huggins, Ltd., 727 F.2d 1225 (D.C. Cir. 1984) 23
Celotex Corp. v. Catrett, 477 U.S. 317 (1986) ..... 6, *passim*
Chipollini v. Spencer Gifts, Inc., 814 F.2d 893 (3d Cir. 1987), *cert. dismissed*, 483 U.S. 1052 (1987) 11
Choate v. TRW, 14 F.3d 74 (D.C. Cir. 1994) 1, 5, 22
Christofferson Dairy, Inc. v. MMM Sales, Inc., 849 F.2d 1168 (9th Cir. 1988) 14
Clark v. Coats & Clark, Inc., 929 F.2d 604 (11th Cir. 1991) ..... 8, *passim*
Colby v. Klune, 178 F.2d 872 (2d Cir. 1949) 23
Dea v. Look, 810 F.2d 12 (1st Cir. 1987) 10
Dimick v. Schiedt, 293 U.S. 474 (1944) 24
Frito-Lay, Inc. v. Willoughby, 863 F.2d 1029 (D.C. Cir. 1988) 18
Hampton v. Handler Hand, 600 F.2d 600 (7th Cir. 1979) 23
Hanna v. Plumer, 380 U.S. 460 (1965) 6
Hickman v. Taylor, 329 U.S. 495 (1946) 6
Hodge v. Evans Financial Corp., 707 F.2d 1566 (D.C. Cir. 1983) 20
Hodge v. Evans Financial Corp., 823 F.2d 559 (D.C. Cir. 1987) 20
In re Coordinated Pretrial Proceedings, 906 F.2d 432 (9th Cir. 1990) 13
Kodak v. Image Technical Serv., 119 L.Ed. 2d 265, 112 S.Ct. 2072, —— U.S. —— (1992) 21
Kozup v. Georgetown University, 851 F.2d 437 (D.C. Cir. 1988) 22

TABLE OF AUTHORITIES—Continued

Page

Leonard v. Dixie Well Serv. & Supply, Inc., 828 F.2d 291 (5th Cir. 1987) 12, 13
Littel v. Evening Star Newspaper Co., 120 F.2d 36 (D.C. Cir. 1941) 20
Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574 (1986) ..... 6, *passim*
McLaughlin v. Liu, 849 F.2d 1205 (9th Cir. 1988) .. 13, 14
Russ v. International Paper Co., 943 F.2d 589 (5th Cir. 1991) ..... 11, *passim*
Seaboard Surety v. Kline, Inc., 11 Md. App. 236, 603 A.2d 1357 (1992) 18
Street v. J.C. Bradford, 886 F.2d 1472 (6th Cir. 1989) 13
T.W. Electric Serv. v. Pacific Elec. Contractors, 809 F.2d 626 (9th Cir. 1987) 13
U.S. v. Diebold, Inc., 369 U.S. 654 (1962) 21
Viterbo v. Dow Chemical, 826 F.2d 420 (5th Cir. 1987) 12, 14

LAW REVIEW ARTICLES:

Steven Alan Childress, *A New Era For Summary Judgment: Recent Shifts At The Supreme Court*, 116 F.R.D. 183 (1987) 6
James V. Chin, *Clark v. Coats & Clark: The Eleventh Circuit Clarifies the Initial Burden in a Motion for Summary Judgment*, 26 Ga. L. Rev. 1009 (1992) 8, 9
Daniel P. Collins, *Summary Judgment and Circumstantial Evidence*, 40 Stanford L. Rev. 491 (1988) 23
Samuel Issacharoff and George Loewenstein, *Second Thoughts About Summary Judgment*, 100 Yale L. J. 73 (1990) ..... 14, *passim*
Marcy J. Lewis, Comment, Summary Judgment: *The Majority View Undergoes A Complete Reversal in the 1986 Supreme Court*, 37 Emory L.J. 171 (1988) 18
Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C.L. Rev. 203 (1993) 19

TABLE OF AUTHORITIES—Continued

Page

Michael Risinger, *Another Step in the Counter Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment*, 54 Brook. L. Rev. 35 (1988-89) 16

William Schwarzer and Alan Hirsch, *Summary Judgment After Eastman Kodak*, 44 Hastings L. J. 1 (1993) 9

Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 Ohio St. L. J. 95 (1988) .....7, *passim*

Brian L. Weakland, *Summary Judgment In Federal Practices: Super Motion v. Classic Model of Epistemic Coherence*, 94 Dickinson L. Rev. 25 (1989) .....6, *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No.

PAT CHOATE,

Petitioner,

v.

TRW, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Pat Choate respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the District of Columbia Circuit (App. A at 1a-7a) is reported at 14 F.3d 74 (D.C. Cir. 1994).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on February 4, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1) The award of summary judgment against Petitioner implicates Petitioner's rights under the Seventh Amendment which provides as follows:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. Const., amend. VII.

2) Respondent TRW filed a motion for summary judgment against Petitioner Pat Choate pursuant to Fed. R. Civ. P. 56 which provides in relevant part:

> (a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.
>
> (b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgement is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.
>
> (c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, to-

gether with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT OF THE CASE

In April 1981, Petitioner Dr. Pat Choate, a distinguished political economist and author, left high-level government service (where he would have been entitled to full retirement benefits at the maximum pay scale) after being recruited by TRW as a policy analyst. Choate Aff. at ¶ 3 (App. E at 19a). Under the negotiated terms of his employment, Dr. Choate was allowed to pursue his independent research and writing activities on his own time and to publish his writings without prior company approval of such projects. Choate Aff. at ¶ 5 (App. E at 20a).

Dr. Choate and TRW enjoyed a good working relationship throughout his tenure. Dr. Choate participated in several management changes, acquired several corporate accolades, and received a substantial job performance bonus just before TRW fired him in 1990. Choate Aff. at ¶ 11 and ¶ 14 (App. E at 22a-23a).

In 1988, Dr. Choate began to consider writing a book on the extent of Japanese influence on the American political process. Dr. Choate discussed this proposed topic with the Chief Operating Officer of TRW, Dr. Ruben Mettler, informing him that the subject matter for the book could be controversial; nonetheless, Dr. Mettler approved the topic. Choate Aff. at ¶ 16 (App. E at 23a).

Afterward, Dr. Choate began to write the book, and on June 30, 1988, the *Washington Post* published an article setting forth the thesis of Dr. Choate's new book: that as foreign ownership of United States assets has

expanded, foreign owners have sought to protect their interests by hiring former officials of the United States government and other politically powerful individuals to promote, lobby, and publicize their interests. The article utilized numerous examples of Japanese "influence peddling" in America. Choate Aff. at ¶ 17 (App. E at 24a). Dr. Choate sent a copy of that article to senior management officials at TRW. Choate Aff. at ¶ 18 (App. E at 24a).

In late June 1988, Dr. Mettler sought and received assurances from Dr. Choate that the book would be factually accurate. Choate Tr. at 97 (App. G at 38a). At that time, Dr. Mettler reiterated his approval of the project. Dr. Choate later had similar discussions with his supervisor Howard Knicely. Choate Tr. at 154 (App. G at 39a).

From June 1988 to June 1990, senior officials at TRW on numerous occasions discussed and reviewed the issue of foreign influence exercised by Japan and other countries (i.e., the thesis of the upcoming *Agents of Influence*). Choate Aff. at ¶ 19 (App. E at 25a). In late 1989 and early 1990, TRW received increased pressure about the pending publication of *Agents of Influence* ("Agents") from TRW's Tokyo office. The adverse advance publicity about the book and TRW's perception of increased antipathy on the part of its Japanese customers prompted TRW to insist on reviewing the manuscript of *Agents*. Choate Aff. at ¶¶ 20-21 (App. E at 25a). However, at no time did TRW revoke its approval of the project, nor did TRW in any way warn Dr. Choate that the book was placing his job in jeopardy. Choate Aff. at ¶ 18 (App. E at 24a). On May 23, 1990, William Lawrence, Dr. Choate's supervisor, informed him that he was going to be terminated. Choate Aff. at ¶ 26 (App. E at 27a). Lawrence told Dr. Choate that firing him would be in the "best interests of the company," asserting that the publication of *Agents* would harm TRW with its Japanese customers. *Id.*

On June 24, 1991, Dr. Choate filed a Complaint against TRW in the Superior Court for the District of Columbia, alleging that TRW breached its employment agreement with Dr. Choate; that TRW failed to perform promises made to Dr. Choate; and that TRW acted negligently by breaching its duty of care owed to Dr. Choate by approving publication of Dr. Choate's book and then firing Dr. Choate because he wrote and published that book. In its defense, TRW claims it never promised Dr. Choate anything.

Upon TRW's motion, the case was removed to the United States District Court for the District of Columbia. After the depositions of Petitioner Pat Choate, Dr. Mettler, and Joseph Gorman, discovery was stayed by the court.[1] Defendant TRW filed its motion for summary judgment March 3, 1992. The District Court granted Respondent TRW's motion for summary judgment despite the evidence presented by Petitioner Pat Choate to demonstrate the presence of material factual disputes. Petitioner appealed the award of summary judgment, and the United States Court of Appeals for the District of Columbia affirmed the entry of summary judgment. *Choate v. TRW, Inc.*, 14 F.3d 74 (D.C. Cir. 1994).

---

[1] At an October 7, 1991 hearing, it was agreed that pending an attempt at mediation, only Dr. Choate, Joseph Gorman and Ruben Mettler would be deposed. *See* Summary Judgment Hearing Transcript at 42-45 (App. F at 31a-33a). The mediation proved unsuccessful, and TRW proffered to the court that once Mr. Gorman's deposition was completed, it would move for summary judgment, which it did. Thus, Petitioner never deposed other TRW employees or witnesses in Japan. The District Court granted summary judgment on an incomplete record.

REASONS FOR GRANTING THE PETITION

I. CONFUSION EXISTS AMONG THE LOWER COURTS AS TO THE BURDEN PLACED ON THE MOVANT, AS WELL AS THE SUFFICIENCY OF THE OPPOSITION BY A NON-MOVANT TO WITHSTAND SUMMARY JUDGMENT

In 1986, this Court attempted to clarify the burden imposed on litigants by Fed. R. Civ. P. 56 in three landmark decisions known collectively as the summary judgment "trilogy."[2] In the years that have followed the trilogy, however, confusion and uncertainty have characterized the application of the summary judgment standards announced in those cases. *See generally* Brian L. Weakland, *Summary Judgment In Federal Practice: Super Motion v. Classic Model of Epistemic Coherence*, 94 Dickinson L. Rev. 25 (1989); Steven Alan Childress, *A New Era For Summary Judgments: Recent Shifts At The Supreme Court*, 116 F.R.D. 183 (1987).

Both the finality of summary judgment and its intrusive impact on a party's right to a jury trial under the Seventh Amendment demand that lower courts apply these principals in uniform fashion. Unlike other areas of the law, disparate justice in this context automatically results in serious encroachment of constitutional rights; therefore, the widespread confusion surrounding these issues renders them special and important and particularly suited to review by this Court. *See generally Hickman v. Taylor*, 329 U.S. 495 (1946); *Hanna v. Plumer*, 380 U.S. 460, 463 (1965).

---

[2] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574 (1986).

A. The Divergent Approaches That Courts Have Utilized in Summary Judgment Cases Demonstrate Their Confusion

The divergent ways in which the lower courts have applied the trilogy standards make it difficult, if not impossible, to predict how courts will treat any given motion for summary judgment. Some of this confusion stems from the nature of the trilogy itself. Some commentators have observed that this Court could have provided the lower courts with more definite guidelines under Rule 56 when they agreed to review the trilogy cases, but did not:

> Instead, the Court announced a summary judgment standard that went well beyond even the most favorable previous prong by seeing rule 56 as the "mirror" of directed verdict rather than as merely informed by rule 50. Coupled with the additional rhetoric and the questionable pro-defendant outcomes in all three cases, the Court effectively rewrote rule 56 to create a summary judgment doctrine that went beyond what even the reformers had urged.

Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 Ohio St. L. J. 95, 157 (1988).

Compounding any confusion with regard to the standards is the sheer legal force embodied in those cases. Recognizing the legal firepower contained within, one commentator has noted that, with the trilogy:

> the Court gives district judges enough precedential ammunition to shoot down cases by summary judgment and keep them down. First, *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.* allows courts to require that claimants present more persuasive evidence to defeat summary judgment when the context renders the claim implausible. Next, *Celotex Corp. v. Catrett* places the burden of showing the existence of a genuine issue of material fact on

> the non-moving party, while the moving party need only assert the basis of its motion. Finally, *Anderson v. Liberty Lobby, Inc.* requires the non-moving party to present enough evidence at the summary judgment stage not only to show a *prima facia* case, but to meet its burden of persuasion as well. Together, these three cases represent the dramatic shift toward the liberal use of summary judgment.

Weakland, *supra* at 31-32 (footnotes omitted).

Even a minute amount of uncertainty or slightest misuse in the summary judgment context necessarily involves serious constitutional ramifications. Thus, the weight of such precedent and the finality of summary judgment make it imperative that the courts apply these principles in a consistent and coherent manner. Instead, due to the varying focus of each of these cases, the lower courts have adopted corresponding varying approaches for dealing with summary judgment motion depending upon which trilogy case they rely. As a result, the outcome of a case may differ dramatically from the outcome of an identical suit in a different jurisdiction. *See* Weakland, *supra* at 46-51.

1. *Some courts appear to be applying pre-trilogy summary judgment standards*

Basically, the cases rendered since 1986 make it hard to divine how each of the circuits are applying the new summary judgment standards. The Eleventh Circuit's treatment of summary judgment exemplifies some of the confusion that has ensued following the summary judgment trilogy. The Eleventh Circuit set out in *Clark v. Coats & Clark, Inc.*, 929 F.2d 604 (11th Cir. 1991), to clarify the law with respect to the parties' burden at the summary judgment stage. *See generally* James V. Chin, *Clark v. Coats & Clark: the Eleventh Circuit Clarifies the Initial Burden in a Motion for Summary Judgment*, 26 Ga. L. Rev. 1009 (1992). It appears, however, that the Eleventh Circuit adopted Brennan's

dissent in *Celotex* and downplayed the significance of the majority opinion.

In a suit for wrongful termination, the district court in *Clark* granted the defendant's motion for summary judgment stating that the plaintiffs had failed to establish a *prima facia* case that the defendant had been motivated by a specific intent to deprive the plaintiffs of pension benefits. *Clark*, 929 F.2d at 606. In reversing the award, the Eleventh Circuit emphasized that the holding in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), remains the general rule: the movant must affirmatively foreclose the possibility that an essential element of the non-movant's claim has occurred. *Clark*, 929 F.2d at 608 (citing *Adickes*, 398 U.S. at 160). The court went on to say that *Celotex* applied only in the unusual situation where neither the plaintiff nor the defendant could affirmatively prove or disapprove the existence of material fact. *Id.*

Several commentators have agreed with the result in *Clark*, but have questioned the Eleventh Circuit's reasoning and analysis, describing *Clark* as "contrary to the letter and spirit" of *Anderson* and *Celotex*. William Schwarzer and Alan Hirsch, *Summary Judgment After Eastman Kodak*, 45 Hastings L. J. 1, 12 (1993). On the other hand, at least one commentator has praised the Eleventh Circuit for clarifying the new standards under Rule 56. Chin, *supra* at 1023.

Given the Eleventh Circuit's express emphasis on *Adickes*, one might think that summary judgment would be difficult to obtain in the Eleventh Circuit and that, despite the trilogy, summary judgment is disfavored in that circuit. However, even if summary judgment is somewhat more difficult to obtain in general in the Eleventh Circuit than in other circuits, it is still hard to predict how a given motion might be treated. For example, in *Barnes v. Southwest Forest Indus.*, 814 F.2d 607 (11th Cir. 1987), the Eleventh Circuit, in affirming the award

of summary judgment, appears to have added an element to plaintiff's prima facie case for employment discrimination, thereby increasing its burden. One might surmise, based on that case, that the Eleventh Circuit may reserve its stringent application of summary judgment standards for the employment discrimination context alone. As with other jurisdictions, however, it is simply hard to tell.

The Third Circuit appears to have joined the Eleventh Circuit in its reluctant approach to granting summary judgment motions. One author has said that it is clear in the Third Circuit that even after the trilogy, "the burden remains with the movant on summary judgment." Weakland, *supra* at 46. This pattern is particularly evident in the employment discrimination lines of cases. *See generally* Weakland, *supra* at 41-45. In such cases, the Third Circuit has consistently held that to defeat summary judgment, the plaintiff does not have to present evidence demonstrating the employer's reasons for termination were pretextual unless the defendant can demonstrate the plaintiff's inability to present such evidence. Weakland, *supra* at 45-46 (citing *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893 (3d Cir. 1987), *cert. dismissed*, 483 U.S. 1052 (1987)).

In contrast, other courts have entered summary judgment where a plaintiff fails to present sufficient evidence showing that an employer's justification for making an employment decision was merely a pretext to discrimination. Weakland, *supra* at 44-45. For example, the First Circuit affirmed summary judgment for a defendant-employer, because the plaintiff failed to come forward with any evidence rebutting an explanation for the plaintiff's termination. *Id.* at 45 (citing *Dea v. Look*, 810 F.2d 12 (1st Cir. 1987)).[3] While the distinction between

---

[3] *See also Carrie v. United States Postal Serv.*, 812 F.2d 621 (10th Cir. 1987) (award of summary judgment upheld where court determined that plaintiffs offered no evidence demonstrating employment decision was based on adverse discrimination).

these approaches may be subtle, the award or denial of summary judgment has turned upon it in these circuits.

Once again, the reasoning behind these approaches is not apparent on the surface. It appears that at least in employment discrimination cases, the Third Circuit continues to apply the *Adickes* standard by requiring the movant/defendant to affirmatively foreclose an element of plaintiff's case. While the judges may not have spelled out their respective rationales, these cases do make it clear that the outcomes of two identical cases would differ in the Third and First Circuits.

2. *Some courts appear to apply a Matsushita-style approach to summary judgment*

At first glance, one might conclude that the Fifth Circuit in *Russ v. International Paper Co.*, 943 F.2d 589 (5th Cir. 1991), adopted the Eleventh Circuit's interpretation of the new summary judgment standards. In *Russ*, the Fifth Circuit affirmed the award of summary judgment in the defendant's favor, because the plaintiffs had failed to put forth any valid Rule 56(e) evidence—all the plaintiffs proffered was a single affidavit that the Fifth Circuit described as "equivocal." *Russ*, 943 F.2d at 592.

In reaching its conclusion, the court expressly stated that the law respecting summary judgment burdens in the Fifth Circuit mirrors that in the Eleventh Circuit. *Id.* at 591. While the *Russ* court also cites *Celotex* and *Anderson* like the Eleventh Circuit did in *Clark*, its analysis differs markedly from *Clark's*. Specifically, the Fifth Circuit focused on the fact that the only affidavit presented by the plaintiffs as to causation contained nothing to indicate that the affiant was competent to testify as an expert, and that the contents of the affidavit were ambiguous. *Russ*, 943 F.2d at 593. Having dispensed with the plaintiffs' only proffered affidavit, the Fifth Circuit was left with allegations and circumstantial evidence. The result-

ing analysis resembles *Matsushita*'s implausibility analysis much more than it does the Eleventh Circuit's emphasis on *Adickes*[4] in *Clark*.[5]

While *Russ* indicates that the Fifth Circuit has adopted more of a *Matsushita*-style approach to summary judgment, certain inconsistencies make it difficult to square the cases in that circuit. For example, the Fifth Circuit in *Leonard v. Dixie Well Serv. & Supply, Inc.*, 828 F.2d 291 (5th Cir. 1987), said that a judge evaluating the "persuasiveness" of evidence at summary judgment "may discount such evidence as unspecific or immaterial, *but not as unbelievable.*" *Leonard*, 828 F.2d at 294 (emphasis added). In affirming the award of summary judgment in another case that same year, however, the Fifth Circuit held that the plaintiff's proffered expert testimony was so lacking in probative value so as to be excludable under Rule 403 of the Federal Rules of Evidence. *Viterbo v. Dow Chemical*, 826 F.2d 420, 422-23 (5th Cir. 1987). While stating that courts should generally defer to the jury as to the weight to be given to an expert's opinion, the Fifth Circuit said: "[i]n some cases, however, the source upon which an expert's opinion relies is of such little weight that the jury should not permitted to receive that opinion." *Id.* Such a result contravenes *Leonard*, and such inconsistent rulings confuse judges, parties, and practitioners.

In a fashion somewhat similar to the Fifth Circuit, the Ninth Circuit has focused on the implausibility analysis set forth in *Matsushita*. The Ninth Circuit, however,

---

[4] As discussed *infra*, this appears to be exactly what the D.C. Circuit did in the Petitioner's case. However, based on both Petitioner's deposition testimony and his affidavit, his case would have gone before a jury in the Fifth Circuit.

[5] However, as discussed *infra*, the Eleventh Circuit does not address the specifics of the movant/defendant's evidence in support of its motion, making it hard to ascertain the exact analytical process utilized in that case.

has made it more clear than the Fifth Circuit that it is using such an approach and provides more definite guidelines when dealing with specific types of evidence. *See In re Coordinated Pretrial Proceedings*, 907 F.2d 432, 440-41 (9th Cir. 1990). Specifically, the Ninth Circuit has interpreted *Matsushita* to mean summary judgment may be granted only when the non-movant's proffer consists of *circumstantial* evidence, and that circumstantial evidence is *implausible*. *Id.*; *McLaughlin v. Liu*, 849 F.2d 1205 (9th Cir. 1988); *Christofferson Dairy, Inc. v. MMM Sales, Inc.*, 849 F.2d 1168, 1172 n.4 (9th Cir. 1988); *T.W. Electric Serv. v. Pacific Elec. Contractors*, 809 F.2d 626, 630-32 (9th Cir. 1987).

In *McLaughlin*, the movant argued that summary judgment was properly granted, because the respondent's affidavit in opposition to summary judgment was "implausible." The Ninth Circuit rejected the argument, holding that *Matsushita*'s implausibility analysis did not apply in cases of *direct* evidence, but only in cases where *circumstantial* evidence was offered in opposition to a motion for summary judgment. *McLaughlin*, 849 F.2d at 1207, 1208. The Third, Fifth [6] and Sixth Circuits, have adopted the same tactic, explicitly noting that *Matsushita*'s implausibility analysis is confined to drawing inferences from circumstantial evidence. *See, e.g., Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc.*, 826 F.2d 1335, 1338 (3d Cir. 1987); *Leonard v. Dixie Well Serv. & Supply, Inc.*, 828 F.2d 291 (5th Cir. 1987); *Street v. J.C. Bradford*, 886 F.2d 1472, 1480 n.21 (6th Cir. 1989).

Thus, in the Ninth Circuit, a judge deciding a motion for summary judgment must first determine whether the non-movant has offered direct or circumstantial evidence in support of its opposition; only when the evidence is circumstantial must the judge render a decision as to

[6] As discussed above, the Fifth Circuit utilized this approach at least once in *Leonard v. Dixie Well Serv. and Supply*, 828 F.2d 291 (5th Cir. 1987).

whether the evidence is "implausible." *McLaughlin*, 849 F.2d at 1207. Thus, where plaintiffs proffer direct evidence of a factual dispute, summary judgment must be denied. *Id.*

In contrast to the Ninth Circuit, the D.C. Circuit's opinion in the instant case furnishes almost no guidance as to its approach or how it reached its conclusion that Petitioner's opposition was insufficient. It appears, however, that the D.C. Circuit may have performed a *Matsushita*-style analysis somewhat like the Fifth Circuit's in *Russ* or *Viterbo*. If that is the case, then the D.C. Circuit used a much more stringent approach than either the Fifth or Ninth Circuits, because the D.C. Circuit dismissed or discounted sworn testimony of a plaintiff with personal knowledge of pivotal facts. Neither the District Court nor the D.C. Circuit discussed the sufficiency of Respondent's showing in any meaningful way, and neither gives the slightest mention as to why the sworn testimony of Petitioner and other evidence proffered were deficient. In fact, the Petitioner finds the D.C. Circuit's selection of evidence to be discussed in its opinion quite baffling. There is no way to tell why the court selected certain snippets of testimony and ignored whole sections of other testimony. However, based on the approaches employed in other cases, it is clear that Petitioner would have prevailed at summary judgment in the Third, Ninth, and Eleventh Circuits, and probably the Fifth Circuit.

B. The Fact That the Courts Provide Little or No Explanation in Granting or Affirming Summary Judgments Shows the Confusion and Fosters Uneven Application

In a recent study, experts found that in the 192 federal court opinions that cited *Celotex* in the first quarter of 1988, 60% of the district courts granting summary judgment to defendants failed to discuss the sufficiency of the defendant's production in support of the motion. Samuel Issacharoff and George Loewenstein, *Second Thoughts*

About Summary Judgment, 100 Yale L.J. 73, 92 (1990). This silence makes it difficult for the appellate courts to redress errors and confusion in the application of the law,[7] and, as discussed below, such silence represents a principle danger presented by the boilerplate application of any legal rule or principle.

The silence on the part of the lower courts may indicate several things. Perhaps the most dangerous implication is that judges have misconstrued the trilogy's message as an unrestrained invitation to clear their dockets in derogation of the Seventh Amendment. As one commentator has warned:

> I have heard one federal judge say in open court during the argument on a motion for summary judgment that "the Supreme Court has told us to make wider use of summary judgment to eliminate cases." That signal seems to have been widely read into the summary judgment trilogy, regardless of the legal unclarity of the opinions and the practical unclarity of the shifting majorities and dissents that these opinions represent. Over time, defendants can be expected to become better at making thinner and thinner "put the plaintiff to his proof about his proof" motions. This, coupled with perceived exhortation for more summary judgments, is bound to lead to many summary judgments improvidently granted in favor of defendants, not because judges do not understand directed verdict sufficiency law (as well as it can be understood), but because they mispredicted what the record would have been at

---

[7] Indeed, the Eleventh Circuit in the *Clark* case discussed *infra*, faced these exact obstacles. Because the district court never discussed the sufficiency of the production made by the movant/defendant, the Circuit Court had to speculate that the district court ". . . believed *Celotex* changed the general rule so that under current summary judgment law whoever has the burden at trial (the plaintiffs here) has the burden on summary judgment." *Clark v. Coats & Clark, Inc.*, 929 F.2d at 608 n.8.

> trial. *And it bears repeating that each time this happens there is not merely an error, but an error of constitutional dimension.*

Michael Risinger, *Another Step in the Counter Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment,* 54 Brook. L. Rev. 35, 42 (1988).

In addition to misinterpretation of the trilogy's message, the silence also indicates that courts are uncertain as to the proper application of the standards. While not as insidious as courts viewing the trilogy primarily as an efficient means of docket control, this uncertainty also causes grave constitutionl errors. Unable to articulate the standards with any confidence, other than cite to the language of the trilogy, the courts remain quiet about how they are reaching their decisions. The *Clark* case discussed above provides an excellent illustration of this trend. As legal experts have observed: *Clark* "provides little by way of context: the court describes neither the factual showing made in support of the motion [for summary judgment] nor the opposition, contenting itself with brief quotes from the trial court's order." Schwarzer and Hirsch, *supra* at 11. Thus, *Clark* provides an excellent illustration of the mixed signals that litigants in lower courts are receiving from circuit courts.

Thirdly, this silence may suggest that courts are making political decisions as to the types of cases that they want to go to trial. *See* Stempel, *supra* at 161. For instances some commentators have speculated that the *Adickes* Court reversed the award of summary judgment in that case because of the important civil rights issues involved. *See* Stempel, *supra* at 123 n.159. That case involved a conspiracy claim stemming from a luncheonette's refusal of service to a white civil rights worker in 1964 and her subsequent arrest in Mississippi. *Adickes,* 398 U.S. 144. The Supreme Court reversed the Second Circuit's affirmance of the grant of the defendant's motion

for summary judgment on the basis that an inference of conspiracy could not be foreclosed from the "factual allegations of [Adicke's] complaint, as well as the material found in the affidavits and depositions presented by Kress . . . , [Kress] failed to carry its burden of showing the absence of any genuine fact." Issacharoff and Loewenstein, *supra* at 80 (quoting *Adickes*, 398 U.S. at 153). In our case, both courts may have, either subconsciously or otherwise, decided that this was a politically distasteful case in so much as the Petitioner had received abundant adverse press for writing *Agents* and had been accused by Respondent TRW and others as being a "Japan basher."

Finally, when the courts do address the standards, they "generally intone that under any measure of quality or quantity the claimant's evidence fails to rise to the required level of proof." Weakland, *supra* at 26. Unfortunately for both judges and litigants attempting to navigate through summary judgment law and precedent, these sorts of "I know it when I see it" pronouncements shed little light on an increasingly murky subject. Moreover, these decisions are based on "self-serving affidavits, selected uncontroverted documents, bits and snatches of deposition transcripts, and similar items." *Id.* at 27. This combination of trial by paper and lack of channel markers, for either other district courts to follow or for appellate review, makes the confusion in the summary judgment arena particularly dangerous.

Again, the case at bar manifests this problem. Neither the District Court nor the D.C. Circuit discussed the sufficiency of Respondent's showing in any meaningful way, and neither gives the slightest clue as to why the sworn testimony of Petitioner and other evidence proffered in opposition were deficient. Indeed, the D.C. Circuit's selection of evidence discussed in its opinion, is bewildering unless one argues that the court was searching for something that would somehow detract from the overall "quality" of Petitioner's proffer.

II. THE PROCEEDINGS BELOW RESULTED IN A PAPER TRIAL WHICH VIOLATED PETITIONER'S RIGHT TO A JURY TRIAL UNDER THE SEVENTH AMENDMENT

In affirming the award of summary judgment in favor of Respondent TRW, the D.C. Circuit relied upon *Frito-Lay, Inc. v. Willoughby*, 863 F.2d 1029 (D.C. Cir. 1988), which cited language from the summary judgment trilogy. Prior to the trilogy, "[s]ummary judgment was regarded by state and federal courts as a sort of a procedural step-child, disfavored and not permitted out in polite society." *Seaboard Surety v. Kline, Inc.*, 11 Md. App. 236, 603 A.2d 1357, 1359 (1992). An explosion of summary judgments followed those three cases. *See generally* Issacharoff and Loewenstein, *supra* at 73; Stempel, *supra* at 95. In its indiscriminate reliance on the trilogy language discussed in *Frito-Lay*, the D.C. Circuit did here precisely what commentators have warned against:

> *There is a danger that the three decisions will be read together as unconstrained permission to grant summary judgment*, and their language will become "boilerplate" in every future application for summary judgment. It is necessary to remember that *Matsushita* is an antitrust conspiracy case and that *Anderson* is a public figure defamation action, historically both special summary judgment categories, and that those cases should be read within their respective contexts. For example, the fact that the liberal use of summary judgment has been advocated in public figure defamation cases like *Anderson* should be considered before citing *Anderson* to support summary judgment in another context.

Marcy J. Lewis, Comment, *Summary Judgment: The Majority View Undergoes A Complete Reversal in the 1986 Supreme Court*, 37 Emory L.J. 171, 214 (1988) (emphasis added).

A. The D.C. Circuit Applied the Trilogy Principles in Boilerplate Fashion in Derogation of Petitioner's Right to a Jury Trial

In the instant case, the D.C. Circuit latched onto the boilerplate language of *Frito-Lay* without any analysis of the facts supporting summary judgment in *Frito-Lay*, and pronounced *Frito-Lay* as requiring affirmance of the judge's grant of summary judgment. The danger of such "boilerplate" application of summary judgment as a favored remedy is profound. The boilerplate application results in paper trials [8]; the lack of incentive to settle cases [9]; and wealth transfer from plaintiffs to defendants.[10] By increasing the anticipated costs, the favored status of summary judgment also discourages a broad spectrum of plaintiffs from entering the litigation arena.[11] Moreover, the plaintiff is now increasingly forced to *prove* his case at the summary judgment phase,[12] and courts are increasingly drawing inferences in the defendant's favor, weighing evidence and deciding issues of credibility.[13]

The dangers of "paper trials" and allowing courts to draw inferences and weigh evidence should not be under-

---

[8] In his dissent in *Anderson*, Justice Brennan said, "I am fearful that this new rule—for this surely would be a brand new procedure—will transform what is meant to provide an expedited 'summary judgment' procedure into a full blown paper trial on the merits." 477 U.S. at 266-67.

[9] Issacharoff and Loewenstein, *supra* at 100-03.

[10] *Id.* at 103-04; *see also* Risinger, *supra* at 35, ("others view it as a cynical movement to restore to defendants, particularly powerful, establishment 'repeat player' defendants . . . advantages they lost by virtue of the Federal Rules' emphasis on . . . decision on the merits.")

[11] Issacharoff and Loewenstein, *supra* at 105-07.

[12] Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C.L. Rev. 203, 230 (1993).

[13] McGinley, *id.* at 230-40.

estimated. Indeed, the instant case manifests such abuse of the summary judgment procedure. The D.C. Circuit either ignored or dismissed out of hand the deposition testimony and the sworn affidavit of Petitioner Pat Choate with respect to the contractual nature of his employment and TRW's promise not to fire him for writing *Agents*. In finding a lack of evidence supporting the "clearly expressed" contractual intent required to overcome the employment-at-will presumption, the D.C. Circuit does not even mention Petitioner's affidavit, which contains his assertion that he stated in his interview that the job be permanent, Choate Aff. at ¶ 4 (App. E at 19a); that Dr. Mettler promised that the employment was permanent, Choate Aff. at ¶ 9 (App. E at 21a); and that Dr. Choate could only be fired for cause. Choate Aff. at ¶ 9 (App. E at 21a). Nor does it discuss or even attempt to distinguish controlling case precedent in the District of Columbia which stands for the proposition that the fact that an employee leaves permanent government service to take a job in the private sector *is in and of itself sufficient to rebut the presumption of at-will employment. Littel v. Evening Star Newspaper Co.*, 120 F.2d 36, 37 (D.C. Cir. 1941); *Hodge v. Evans Financial Corp.*, 707 F.2d 1566 (D.C. Cir. 1983); *Hodge v. Evans Financial Corp.*, 823 F.2d 559 (D.C. Cir. 1987). The D.C. Circuit's decision simply flies in the face of these controlling cases.

Moreover, the D.C. Circuit completely ignores Dr. Choate's testimony regarding TRW's promise not to fire him for writing *Agents*:

> Q. Was it your understanding that . . . Howard Knicely would protect you against any employment action at TRW if that action was based on the book published as *Agents of Influence?*
>
> A. Of course.
>
> Q. And that regardless of its impact at TRW, that no employment action would be taken against you?
>
> A. Correct.

> Q. And that was a stated or unstated assumption of your discussion [about the book], for example, with Dr. Mettler?
>
> A. That was the *stated* assumption. It was certainly the basis of the conversation with Dr. Mettler. *I just as easily could have chosen a different topic.*
>
> * * * *
>
> It was not only my understanding, *it was my agreement with TRW that I could write this book,* do it on my own time; in fact, was given repeated corporate leaves of absence, without pay, to write this book, *and that when book was published, that it would have no adverse effect on my employment, my relationship with TRW. That is the promise that TRW made me.*

Choate Tr. at 154-55 (App. G at 39a) (emphasis added). In 1992, this Court clarified *Matsushita Electric Industrial Co. v. Zenith Radio*, 475 U.S. 574 (1986), by stating that "*Matsushita* demands *only that the nonmoving party's inferences be reasonable* in order to reach the jury, a requirement that was not invented, but merely articulated in that decision." *Kodak v. Image Technical Serv.*, 119 L.Ed. 2d 265, 285, 112 S.Ct. 2072 (1992) (emphasis added) (citing *Matsushita*, 475 U.S. at 574 (citations omitted)). In *U.S. v. Diebold, Inc.*, 369 U.S. 654 (1962), this Court stated that: "On summary judgment, the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion." *U.S. v. Diebold, Inc.*, 369 U.S. at 655.

Ignoring the admonitions of this Court, the D.C. Circuit wholly disregarded the above-quoted testimony from Dr. Choate, finding that there was no evidence to support promissory estoppel. Instead, the D.C. Circuit concludes as follows:

> Choate asserts that the CEO of appellee, knowing the nature of the book, told him, "The topic sounds

> wonderful, and I have no problems with it." Choate asserts that this is the promise on which he relied.

Choate v. TRW, 14 F.3d 74, 77 (D.C. Cir. 1994) (App. A at 7a). The portion of Petitioner's testimony quoted immediately above and inexplicably singled out by the D.C. Circuit [14], demonstrates that the court simply did not or chose not to consider the direct evidence proffered by Petitioner to support his claim. In doing so, the court unduly encroached upon his rights under the Seventh Amendment to have a jury act as a factfinder. Clearly, Petitioner Pat Choate was entitled to the inference from his deposition testimony and his affidavit that Mettler did in fact "promise" he could write *Agents* and not suffer any employment impact. *See Kozup v. Georgetown University*, 851 F.2d 437, 439 (D.C. Cir. 1988) (the drawing of inferences is a jury function).

B. The Case Below Turned on Issues of Witness Credibility and Therefore Should Have Reached a Jury

By choosing between the inferences allowed by the evidence proffered by Dr. Choate and by characterizing certain factual disputes as immaterial [15] when in fact those issues were outcome determinative, the D.C. Circuit violated Petitioner's right to a jury trial and to have a jury decide the facts of the case. As one commentator has said:

> Since direct evidence concerning a historical fact therefore hinges on the witnesses' credibility and

---

[14] As discussed in Section I above, although it is never explicitly stated, it appears that the D.C. Circuit may have applied some sort of "implausibility" analysis in reaching their conclusion. (as set forth in *Matsushita*, 475 U.S. 574).

[15] The D.C. Circuit said: "[Choate] has testified that he understood the employment to be nonterminable because TRW referred to the employment as being "long term" and that he left secure government employment to accept the position. While each of these assertions may be disputed, *none of them are material*, for none of them affects the outcome of the litigation." *Choate v. TRW, Inc.*, 14 F.3d at 77 (App. A at 6a) (emphasis added).

> cognitive abilities, a true conflict concerning such evidence is exclusively within the province of the jury and may not be removed from its consideration by the judge without violating the Seventh Amendment.

Daniel P. Collins, *Summary Judgment and Circumstantial Evidence*, 40 Stanford L. Rev. 491, 494 (citing *Colby v. Klune*, 178 F.2d 872, 873 (2d Cir. 1949); *Hampton v. Handler Hand*, 600 F.2d 600, 625 (7th Cir. 1979) (directed verdict case), *rev'd in part on other grounds*, 446 U.S. 754 (1980); *Carter v. Duncan-Huggins, Ltd.*, 727 F.2d 1225, 1234 (D.C. Cir. 1984) (J.N.O.V. case)).

The historical facts at issue in our case are essentially two-fold: 1) what did TRW tell Dr. Choate in his interview and what did the parties intend with respect to his employment, and 2) what did TRW tell Choate with respect to his writing of *Agents* and what did the parties intend? Therefore, Dr. Choate's testimony concerning the formation of the employment relationship and conversations concerning the writing and approval of *Agents* was absolutely essential. These questions revolve around witness credibility because Dr. Choate has sworn: (1) that TRW promised him permanent employment; (2) that TRW promised he could only be fired for cause; (3) that he left secure government employment; and (4) that TRW promised Dr. Choate that he would not be adversely affected with respect to his job by writing *Agents*. TRW disputes each of the above statements. A jury should be given the opportunity to view the demeanor and credibility of the witnesses presented by both Dr. Choate and TRW to determine who really said what to whom and what did they mean.

Based on the oral assurances given by TRW with specific reference to the writing of *Agents*, a jury could reasonably find that TRW promised Dr. Choate that no adverse employment consequences would result. The D.C. Circuit substituted its preference and disregarded a

range of permissible inferences. For example, from the fact that Dr. Choate wrote the book when he could have chosen other topics, a reasonable jury could infer that he had been promised that such an undertaking would not threaten his job. Instead of focusing on what should have been reasonable inferences, the D.C. Circuit imposed its own conclusion, in the face of direct evidence, that Petitioner's claim was implausible.[16]

CONCLUSION

While summary judgment may constitute an efficient means of dispensing with meritless claims, one of its chief dangers lies in the fact that improper use means a significant violation of constitutional rights. "No less formidable than any other constitutional guarantee, the Seventh Amendment suffers as the courts broaden summary judgment standards, because it is summary judgment that deprives a litigant of jury review." Weakland, *supra* at 28. The confusion regarding the proper application of the summary judgment standards has caused some courts to infringe upon the province of the jury in derogation of the Seventh Amendment. As this Court has said, "[m]aintenance of the jury as fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1934). To curb these constitutional intrusions and to restore proper and consistent application of summary judgment

---

[16] *See* Section I, *infra*. The District Court engaged in the same inappropriate factfinding and camouflaged its factfinding and preferences by employing a completely unrealistic and irrelevant hypothetical: that it was unreasonable for Dr. Choate to think that he could write "whatever he wanted" without consequence. (App. B. at 12a). Such a statement is irrelevant to the issues involved. Dr. Choate's promissory estoppel claim revolves around whether or not TRW promised Choate that he could write *Agents* without fear of losing his job.

law, this Court should grant a writ of certiorari and address these issues.

For the foregoing reasons, Petitioner Pat Choate respectfully requests that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

DALE A. COOTER *
DONNA S. MANGOLD
MARY M. BAKER
COOTER, MANGOLD, TOMPERT,
& CHAPMAN, P.C.
2000 L Street, N.W.
Suite 200
Washington, D.C. 20036
(202) 289-5600
Attorneys for Petitioner

* Counsel of Record

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 21, 1993 Decided February 4, 1994

No. 92-7107

PAT CHOATE,

Appellant,

v.

TRW, INC.

Appeal from the United States District Court
for the District of Columbia

(91cv01719)

Before EDWARDS, BUCKLEY, and SENTELLE, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SENTELLE.

SENTELLE, *Circuit Judge*: Appellant Choate sued his former employer, appellee TRW, Inc., for alleged wrongful discharge, alleging claims based on breach of contract and promissory estoppel.[1] The District Court granted sum-

---

[1] Choate's complaint alleged a third count sounding in negligence. Choate briefed the claim on appeal, but the parties did not discuss it at oral argument. As the claim is in any event frivolous, we will affirm the District Court's grant of summary judgment as to it without further discussion. *See District of Columbia v. White*, 442

mary judgment on both claims. As the record revealed nothing sufficient to overcome the presumption of at-will employment and no foundation for a claim of promissory estoppel, we affirm.

I. BACKGROUND

A. *The Factual Record*

Taking the record evidence before the District Court in the light most favorable to the appellant, as we must do in the summary judgment context, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), the facts in this case are as follows. In March of 1981, Dr. Pat Choate, theretofore a career civil servant and then member of the Senior Executive Service with the Department of Commerce, accepted a position as a senior policy analyst with TRW. He remained in TRW's employ until his firing in 1990, during the interim advancing through two promotions to Vice President of the Office of Policy Analysis. From the beginning of his employment, appellant wrote and published books and articles on his own time. In 1988 he mentioned to Reuben Mettler, then Chief Executive Officer of TRW, that he might write a treatise on foreign (particularly Japanese) influence in the American political system to be entitled AGENTS OF INFLUENCE. Approximately one month after that conversation, Choate published an article in the *Washington Post* on the topic of foreign influence. That same month, he presented his thesis for the book in a speech before TRW's bi-annual senior management meeting.

A.2d 159, 162 (D.C. App. 1982) ("To allege negligence, the complaint cannot merely make conclusory allegations but must specify a negligent act and characterize the duty whose breach might have resulted in negligence liability.") (internal quotation marks and citation omitted); *Chesapeake & Potomac Tele. Co. v. Dowdy*, 365 S.E.2d 751 (Va. 1988) (employer owes no duty of care to employee independent of employment contract).

In late 1989 and 1990, pre-publication advertising for AGENTS OF INFLUENCE, frequently identifying Choate as a senior TRW officer, generated an increasingly high profile image of Choate as a "Japan-basher." TRW, which did extensive business with Japanese customers, concluded that Choate's continued employment was inimical to its business interests and terminated him.

We will discuss other facts as pertinent to our analysis of the applicable law *infra*.

B. *The Litigation*

Choate sued TRW in the Superior Court of the District of Columbia for $30 million. TRW removed the case to District Court on diversity grounds. After some discovery, including a deposition of Choate, TRW moved for summary judgment, contending that even if the version of the facts Choate described in his deposition was accepted as true, these did not establish the alleged employment contract, or the allegedly estopping promise of continued employment. Choate responded with an opposition and an affidavit contending that his employment contract allowed TRW to terminate him only if: (1) he failed to perform his job well; (2) he engaged in unethical or illegal conduct; or (3) TRW became bankrupt—none of which allowed TRW to terminate him because of his writings or their impact on the employer.

After additional briefing, the District Court entered summary judgment in favor of appellee on the whole action.

II. ANALYSIS

TRW's success in the District Court, and ultimately in this Court, begins with the proposition that an employment relation of unspecified indefinite duration is presumptively employment "at will," terminable by either the employer or the employee with or without cause. *Littell v. Evening Star Newspaper*, 120 F.2d 36, 37 (D.C. Cir. 1941); *Sulli-*

van v. Snap-On Tools, 708 F. Supp. 750, 751 (E.D.Va. 1989), *aff'd mem.*, 896 F.2d 547 (4th Cir. 1990). We note, as did the District Court, that although the parties seem to have treated the employment relationship as being governed by the law of the District of Columbia, it is not at all certain that the law of Virginia does not control, as that is the actual location of TRW's offices. In any event, as both Virginia and the District of Columbia are "at will" jurisdictions, it is not essential that we make that choice of law.

In an at will jurisdiction, a plaintiff, such as Choate, suing for breach of employment contract must rebut the presumption that the employment is "at will." In order to rebut the presumption, the employee must present evidence of a "clearly expressed" contractual intent on the part of both the employer and the employee. *Minihan v. American Pharmaceutical Ass'n*, 812 F.2d 726, 727 (D.C.Cir. 1987); *Sullivan v. Heritage Foundation*, 399 A.2d 856, 860 (D.C. App. 1979).[2] In the present case, not only has Choate failed to establish such a clearly expressed contractual intent, but the record evidence at summary judgment was wholly inconsistent with Choate's proposition and supportive of the presumption.

For example, to confirm an earlier oral offer of employment to Choate, TRW sent a letter offer setting forth terms of salary, benefits, incentive pay, stock options and savings plans, but not specifying any term of length for employment. Instead, the letter merely recited the parties' understanding that the employment contemplated was on a "long

---

[2] In Virginia, the rule may be slightly different. "Virginia adheres to the common law rule that when the intended duration of a contract for the rendition of services cannot be determined by *fair inference* from the terms of the contract, then either party is ordinarily at liberty to terminate the contract at will, upon giving the other party a reasonable notice." *Miller v. SEVAMP, Inc.*, 362 S.E.2d 915, 917 (Va. 1987) (emphasis added). The difference is immaterial. As there is nothing in the record before us that gives rise to a fair inference of the intended duration, the District Court correctly held that the at will presumption prevailed unrebutted.

term basis," clearly consistent with the underlying principle of at-will employment that the employment relationship was of unspecified indefinite duration.

Moreover, within a few months of beginning work for TRW, Choate signed an Employee Confidential Information Agreement that designated TRW as the "employer" during "such time as may be mutually agreeable to the employer and [the employee]." Choate also received a copy of the company's Policy Manual, which stated that "TRW, of course, reserves the right, to the extent permitted by applicable law, to terminate any employee at any time."

Appellant asserts that he has presented evidence to counter the presumption. He reminds us, rightly, that his burden at the summary judgment stage was met if he but established that there was a genuine issue of material fact. Fed. R. Civ. P. 56(c). We make this determination *de novo,* as the record before us is the same as that before the district judge and the question is one of law. *Petersen v. Dole,* 956 F.2d 1219, 1221 (D.C. Cir. 1992); *Parmac, Inc. v. IAM Nat. Pension Fund Ben. Plan,* 872 F.2d 1069, 1071 (D.C. Cir. 1989). We must determine first whether the moving party discharged its duty by "informing the . . . court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)). We must then determine whether the nonmoving party successfully established that there is such a genuine issue. *Id.; Frito-Lay, Inc. v. Willoughby,* 863 F.2d 1029, 1032 (D.C. Cir. 1988).

Where, as here, the "nonmoving party shoulders the burden of proof at trial, the movant's burden is met by a sufficient showing . . . that there is an absence of evidence to support the nonmoving party's case." *Frito-Lay,* 863

F.2d at 1032 (alteration in original) (internal quotation and citations omitted). Here the movant, TRW, relies principally on a lack of evidence of the "clearly expressed" contractual intent that is required to defeat the at will presumption. *Minihan,* 812 F.2d at 727; *Miller,* 362 S.E.2d at 917; *Sullivan,* 399 A.2d at 860. Appellant responds that he has presented the evidence to create a genuine issue as to this materal fact: He has testified that he understood the employment to be nonterminable because TRW referred to the employment as being "long term" and that he left secure government employment to accept the position. While each of these assertions may be disputed, and therefore create a genuine issue, none of them are material, for none of them affects the outcome of the litigation. The best that Choate has done by this showing is put himself in company with the plaintiff-appellant in *Minihan.* There we described as "well-settled" the law that "in the absence of clearly expressed contrary intent," the presumption of at will employment prevails "even though the parties speak in terms of 'permanent' employment" and that the legal assumption is that by using that term "the parties have in mind merely the ordinary business contract for a continuing employment, terminable at the will of either party." 812 F.2d at 727 (internal brackets and quotation marks omitted) (citing *Sullivan v. Heritage Foundation,* 399 A.2d 856, 860 (D.C. App. 1979)). In short, the District Court did not err in granting summary judgment on the breach of contract claim.

Neither did the District Court err in granting summary judgment in favor of TRW on the promissory estoppel claim. We will assume for the sake of argument that the relevant jurisdiction, whether the District of Columbia or Virginia, would recognize promissory estoppel claims on appropriate facts. Where recognized, the promissory estoppel doctrine is that a promise that the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee

and that does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. *Granfield v. Catholic University of America*, 530 F.2d 1035, 1042 (D.C. Cir. 1976) (citing RESTATEMENT OF CONTRACTS, § 90).

TRW asserts that it has made its necessary showing that there is no genuine issue of material fact, in that the non-movant cannot support an essential element of his claim. *Frito-Lay*, 863 F.2d at 1032. Specifically, TRW asserts that the record provides no support for the existence of an estopping promise in the first instance, let alone the reasonable expectation and actual inducement required even to reach the injustice question. We agree.

Choate asserts that the CEO of appellee, knowing the nature of the book, told him, "The topic sounds wonderful, and I have no problems with it." Choate asserts that this is the promise on which he relied. But a promise is "an expression of intention that the promisor will conduct himself in a specified way or bring about a specified result in the future, communicated in such a manner to a promisee that he may justly expect performance and may reasonably rely thereon." 1 CORBIN ON CONTRACTS § 13 (1963). Even taking the evidence in the light most favorable to appellant, Dr. Mettler's statement does not meet that description. As the claim of an estopping promise could not "reasonably be resolved in favor of" Choate, *Liberty Lobby*, 477 U.S. at 250, summary judgment was warranted.

III. CONCLUSION

For the reasons set forth above, we conclude that the District Court properly granted summary judgment as to all claims. The judgment of the District Court is

Affirmed.

APPENDIX B

[Filed May 27, 1992]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 91-1719 (TPJ)

PAT CHOATE,

Plaintiff,

v.

TRW, INC.,

Defendant.

MEMORANDUM AND ORDER

This is an action by a former corporate executive arising out of the sundering of his employment relationship. The case has been removed from state to federal court by the defendant-employer on diversity of citizenship grounds, and is presently before the Court on the motion of the defendant for summary judgment. Basic discovery has been completed.[1]

I.

Plaintiff Pat Choate, a distinguished political economist and author, left high-level government service in April, 1981, for a position with the defendant TRW, Inc. ("TRW"), as a policy analyst. He was later promoted to vice president. Choate's employment under-

---

[1] Trial is presently scheduled for August 31, 1992, with a number of costly and controversial depositions proposed to be taken abroad, however, if the case is to proceed to trial.

standing with TRW allowed him to continue his independent research and writing activities on his own time, and to publish his work without prior company approval, which he did until their parting of ways in August, 1990.[2]

Choate's work for TRW remained at all times satisfactory to TRW. He survived several management changes, received commendations, and was paid a substantial performance bonus shortly before he was fired.

In 1988 Choate's scholarly interest turned to the subject of the extent of Japanese influence on the American political process to secure economic advantages for Japanese enterprises. He began a new book, eventually published under the title *Agents of Influence* (1990), which he previewed in an article he wrote for *The Washington Post* in June, 1988, asserting that foreign economic interests—in particular, the Japanese—were engaged in extensive lobbying of U.S. government officials to protect Japanese investments in U.S. markets, employing former U.S. government officials as their principal advocates.

Among its diverse activities world-wide TRW does a considerable amount of business in Japan. TRW grew apprehensive that its relationship with Japanese customers would be adversely affected by the publication of such a book as *Agents of Influence* by one prominently identified, as a senior company official, with TRW. It sought reassurances from Choate (specifically, Choate says, that he would be certain to be accurate), but it never attempted to prevent or forbid the book's publication nor intimated that its thesis would place Choate's employment in jeopardy.

Nevertheless, adverse advance publicity about the book (and its author) in Japan, and a perception on the part of TRW of an increasing antipathy on the part of its

---

[2] Choate published three books while at TRW: *America in Ruins* (1981); *Thinking Strategically* (1984); and *The High Flex Society* (1986).

Japanese customers, prompted TRW to insist on reviewing the manuscript of *Agents of Influence*. When it so did in May, 1990, it found the text to be inimical to its business interests in Japan and informed Choate he would be discharged as of August 15, 1990, as, in fact, he was.[3] This lawsuit followed the succeeding July.

II.

TRW contends that Choate was an "at will" employee, one terminable by the company at its pleasure at any time for any or no reason. Choate responds that his was a contract for "permanent" employment, i.e., that he was entitled to remain a TRW employee if he chose, unless TRW possessed "just cause" to dismiss him, until his death, resignation, or retirement.

The record discloses that Choate was hired when he accepted an offer of employment contained in a letter from TRW dated March 20, 1981. Although some other terms and conditions of his employment are expressly set forth, the letter says nothing about the duration of the employment relationship, other than to express a hope for a "long term" association between them. Under the law of both the District of Columbia and Virginia,[4] an employment relationship of unspecified indefinite duration is presumptively employment "at will," terminable by either employer or employee without excuse or explanation. *Littel* v. *Evening Star Newspaper Co.*, 120 F.2d 36 (D.C. Cir. 1941); *Sullivan* v. *Snap-On Tools*, 708 F. Supp. 750 (E.D. Va. 1989).[5]

---

[3] Efforts to negotiate an amicable departure, a "resignation" with severance benefits and a post-employment "consulting" relationship, foundered when it was publicly reported in the media that TRW has "forced" an unwilling Choate to leave the company.

[4] TRW's local offices are located in Virginia.

[5] The District of Columbia recognizes two exceptions to the rule: retaliatory firings for complaints of unlawful discrimination, and any other dismissals which offend public policy.

Choate opposes TRW's motion for summary judgment, contending that issues of fact relating to the parties' intentions as to the duration of his employment stand in the way. However, the Supreme Court has held that summary judgment should be granted, in circumstances such as those presented here, unless the "facts" putatively in dispute are genuinely material to the existence of a *prima facie* case sufficient to require submission of the controversy to a jury. *Matsushita Elec. Industrial Co.* v. *Zenith Radio,* 475 U.S. 574 (1986).

The facts Choate declares to be in dispute here are not, in the Court's judgment, material to the outcome. They are, in the main, related to the inferences to be drawn from the parties' harmonious course of dealings with one another over the years, as signifying TRW's favorable disposition towards Choate's long-term future with the company. But, in the absence of proof of a genuine and specific "meeting of the minds" between employer and employee for a finite term of service, (i.e., its length being determinable by reference to some event other than one's party intention of the moment), the employment relationship is presumptively terminable "at will," or, in other words, at the sole discretion of either one desiring to end it. An employee's subjective expectations of indefinite employment, even if induced by his employer's laudatory expressions of satisfaction with his performance, do not bind the employer to keep him in its employ. To rebut the presumption of employment "at will," the evidence of a contrary contractual intent on the part of both employer and employee must be "clearly expressed." *Minihan* v. *American Pharmaceutical Association,* 812 F.2d 726, 727 (D.C. Cir. 1987); *Miller* v. *SEVAMP, Inc.,* 362 S.E.2d 915, 917 (Va. 1987); *Sullivan* v. *Heritage Foundation,* 399 A.2d 856, 860 (D.C. 1979). No such contrary intent has ever been expressed, clearly or otherwise, by TRW to Choate (or, for that matter, by Choate to TRW), and TRW's Policy Manual has expressly stated at all times during Choate's

tenure with TRW (although he may never have consulted it) that the company "reserves the right . . . to terminate any employee at any time."

Similarly, TRW's failure to criticize Choate's earlier writings or to forewarn him that the subject of Japanese lobbying activity in the United States was off-limits, do not estop it into a perpetual employment relationship with him that it no longer desires to maintain. None of the essential elements of a contract by estoppel are shown by the evidence here. Nothing said to Choate, by either Choate's account or TRW's, amounted to an unequivocal promise to keep him on the TRW payroll for as long as he chose to remain. No one at TRW gave Choate reason to believe that there were absolutely no limits to which he could go in his literary pursuits, on his own time notwithstanding, without compromising his continued usefulness to the company. *See Granfield* v. *Catholic University of America,* 530 F.2d 1035 (D.C. Cir.), *cert. denied,* 429 U.S. 821 (1976).

III.

Finally, even if the evidence would support a finding that the relationship between Choate and TRW was a contract of permanent employment, and thus terminable only for "just cause," the Court concludes that such cause is to be found in the record here. "Just cause" does not necessarily import malfeasance, misfeasance, or dishonesty on the part of even a permanent employee before he may be discharged. It may as well be the loss of economic viability of the employer, as Choate concedes, or the employee's physical incapacity. Both are circumstances which may occur entirely without fault on the employee's part, and may also be altogether beyond his control.

But "just cause" may also be found in conduct of an employee that "is so inconsistent with the employer-employee relationship that it prejudices a valid business interest of the employer." *Brock* v. *Mutual Reports, Inc.,*

397 A.2d 149, 153 (D.C. 1979). *See also Korb* v. *Raytheon Corp.*, 574 N.E.2d 370, 371 (Mass. 1991); *NLRB* v. *Local Union No. 1229, IBEW*, 346 U.S. 464, 472 (1953).

Choate contends that "just cause" for the dismissal of a permanent employee is itself an issue of fact which the jury alone can decide, *see Brock, supra,* but in this case the "cause" for his dismissal is both known and conceded. The balance of the issue is, therefore, simply the matter of its justification, and that requires only that the cause not be arbitrary or capricious. *Hodge* v. *Evans Financial Corporation,* 823 F.2d 559, 568 (D.C. Cir. 1987).

Here, the justification is found in the irreconcilable conflict between Choate's continued identification with TRW, as a senior company official, and his contemporaneous espousal of his well-publicized critical views about a major source of TRW's business. Whether he is right or wrong in those views is immaterial. The connection is rational, and thus TRW had valid reason to end its association with Choate in the circumstances.

For the foregoing reasons, it is, this 27th day of May, 1992,

ORDERED, that defendant's motion for summary judgment is granted, and the complaint is dismissed with prejudice.

/s/ Thomas Penfield Jackson
THOMAS PENFIELD JACKSON
U.S. District Judge

APPENDIX C

[Filed Feb. 28, 1992]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 91-1719

CHOATE,

Plaintiff,

v.

TRW,

Defendant.

INITIAL PRETRIAL/SCHEDULING ORDER

In the exercise of its inherent power to control the presentation of this case in a manner most likely to secure its just, speedy, and inexpensive determination, except as may be hereafter otherwise ordered, it is this 28 day of Feb. 92, ORDERED, as follows:

Discovery closes as of 7-15-92, and trial is set for 8-31-92, at 10:00 a.m. Status conferences may be scheduled from time to time to monitor the progress of the case or reschedule events as necessary.

I. *TRIAL.* When the case is called for trial the following shall have been accomplished:

A. In jury cases the parties shall have submitted all *voir dire* questions and jury instructions desired, in writing, with accompanying citations in support. (Common instructions may be requested by reference to the current edition of ***Standardized Civil Jury Instructions for the District of Columbia***).

B. Exhibits shall have been pre-marked in a numerical order. On or before the day of trial each party shall deliver to the Courtroom Clerk a complete list and one set of its original exhibits for the use of the Court during trial. The parties may, by agreement, number all exhibits without regard to the identity of the party-proponent.

C. All parties shall be prepared to submit authority on all non-routine legal issues which may, in the exercise of due diligence, be reasonably anticipated as likely to arise at any time during trial.

II. *DISPOSITIVE MOTIONS.* Dispositive motions should ordinarily be filed only before extensive discovery has begun or after it has been completed. Any party may apply for a stay of discovery in whole or part, for good cause shown, except such discovery as may be appropriate under Fed.R.Civ.P. 56(f), pending determination of a dispositive motion. Dispositive motions, as are other motions, will generally be governed by D.D.C. Rule 108, but a briefing schedule and oral argument on pre-discovery dispositive motions, if any, may be set by a separate scheduling order. Oral argument on post-discovery dispositive motions will be set by the Court in advance of the Final Pretrial Conference if time permits. Motions which would be dispositive of less than the entire case if granted, however, will ordinarily not be determined until immediately prior to trial.

III. *DISCOVERY.* The following general conditions of discovery are imposed in accordance with Fed.R.Civ.P. 26(f) (in addition to such special conditions as may be imposed orally in open court or by written order hereafter entered):

A. Counsel are expected to communicate and to cooperate with one another in conducting discovery, and they are likewise expected to make good faith efforts to resolve discovery disputes *inter se* without resort to the Court. Reasonable expenses, including attorneys' fees, will

routinely be awarded for abuses of the discovery process, e.g., failures to make discovery which are not substantially justified or requests for discovery which are burdensome and oppressive. Before filing motions on contested matters of discovery, the parties are urged to arrange for an informal, non-binding conference with the Court.

B. Full disclosure is favored, with issues of privilege, work product, invasion of privacy, and the like to be addressed whenever possible by argeement of counsel, or when impossible by protective orders (preferably by consent) limiting dissemination rather than withholding altogether.

C. Institutional parties are to be deposed by designation pursuant to Fed.R.Civ.P. 30(b)(6). Multiple depositions of institutional agents will not be permitted except by consent of the parties or with leave of Court.

D. A formal schedule for the counter-designation of expert witnesses will ordinarily not be set by the Court unless requested. Depositions of adverse experts who are expected to be called at trial will ordinarily be permitted notwithstanding previous Fed.R.Civ.P. 26(b)(4) disclosures have been made with respect to their anticipated testimony.

E. Discovery materials (e.g., interrogatories and answers, requests for admissions or documents and responses thereto, documents produced, notices of and deposition transcripts) shall generally *not* be filed with the Clerk, except as attachments to appropriate motions or by leave of Court.

IV. *FINAL PRETRIAL CONFERENCE.* Upon the close of discovery the case is referred to a U.S. Magistrate pursuant to D.D.C. Rule 503 to conduct a Final Pretrial Conference in accordance with D.D.C. Rule 209, and to hear and determine (or make proposed findings of fact and recommendations for the disposition of) all pretrial motions and matters pending at such time or filed there-

after until the Final Pretrial Conference. The Final Pretrial Conference shall be conducted at a date and time to be set by, and in accordance with the orders of the Magistrate, but each party shall file a pretrial statement in advance of the Final Pretrial Conference containing, at a minimum, those matters required by D.D.C. Rule 209(b).

Proceedings at the Final Pretrial Conference shall be recited in a Final Pretrial Order to be entered by the Magistrate (together with the Magistrate's rulings/recommendations on any matters pending at the time) and shall control the subsequent course of the action unless modified by the Court to prevent manifest injustice.

V. *SETTLEMENT.* Counsel are expected to evaluate their respective cases for settlement purposes without participation by the Court. Unless all parties are agreed that the Court could be of substantial assistance in reaching settlement and jointly request that it do so, the Court will not routinely conduct settlement conferences in either jury or non-jury cases.

VI. *POST-TRIAL PROCEEDINGS IN NON-JURY CASES.* The parties are generally expected to submit proposed findings of fact and conclusions of law, ordinarily within thirty (30) days following completion of the trial transcript, which shall include citations to the record (including transcript page and exhibit numbers) and pertinent legal authorities. Final arguments will ordinarily be postponed until after submission of proposed findings and conclusions.

/s/ Thomas Penfield Jackson
THOMAS PENFIELD JACKSON
U.S. District Judge

APPENDIX D

[Filed Oct. 21, 1991]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 91-1719

PAT CHOATE,

Plaintiff,

v.

TRW, INC.,

Defendant.

ORDER

In accordance with the proceedings in open court at the status conference of October 7, 1991, it appearing to the Court that both parties have consented to proceed by mediation, it is this 21st day of October, 1991,

ORDERED, that all contested proceedings in this case are stayed for 90 days from the date of this order; and it is

FURTHER ORDERED, that this case is referred to mediation; and it is

FURTHER ORDERED, that counsel and parties, including persons with settlement authority, attend the meditation; and it is

FURTHER ORDERED, that mediation efforts be concluded by the 21st day of January, 1992, at which time the case is scheduled for a status conference at 9:30 a.m. if not earlier concluded.

/s/ Thomas Penfield Jackson
THOMAS PENFIELD JACKSON
U.S. District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

Civil Action No. 91-1719-TPJ

PAT CHOATE,

Plaintiff,

VS.

TRW, INC.,

Defendant.

AFFIDAVIT OF PAT CHOATE

I, Pat Choate, under penalty of perjury, do depose and state as follows:

1. I am over eighteen years of age and competent to give testimony on the issues stated herein.

2. I am the Plaintiff in the above-referenced action.

3. In 1980 and early 1981, TRW actively recruited me to leave my government position with the Department of Commerce and join TRW to assist TRW in providing constructive leadership in shaping public policies for the United States. This was one of TRW's articulated corporate goals.

4. Early in 1981, Lloyd Hand, then a Senior Vice President with TRW in D.C., initiated discussions with me concerning a position in the public policy office with TRW. From the outset, I made it clear that I would only accept a permanent, long-term position with a company for whom

public policy issues were a primary focus. That the position be long-term and permanent was a priority with me because I was leaving a long-term career in government service at the top of the civil service pay scale. As a career Civil Servant and a member of the Senior Executive Service with outstanding ratings, I would have been entitled to a guaranteed civil service pension at the maximum pay scale and health benefits after 20 years of service. Accordingly, I believed I had found at TRW a position that encompassed my desires to work until retirement in the private sector for a reputable company that shared my interest in public policy issues.

5. Before accepting employment with TRW, I also sought assurances that I would be permitted to write books and articles and accept public speaking engagements on my own. In our preliminary discussions, which took place in D.C., Mr. Hand promised me that I would be permitted, and even encouraged, to engage in independent writing and speaking activities. This promise was renewed over the years by my subsequent supervisors at TRW.

6. In its recruitment of me, TRW approached the pending employment relationship with equal seriousness and commitment. TRW subjected me to more than eleven interviews, which were in D.C. and Ohio, including interviews with virtually every member of the management committee, the Chairman and CEO. In total I spent more than four days over a period of three months discussing with TRW senior officers in D.C. and Ohio the scope of my employment, their aspirations for the corporation and their vision for the public policy function.

7. The employment discussions between TRW and me culminated in a March 20, 1981 letter from Lloyd Hand to me confirming TRW's oral offer of employment to me as a Senior Policy Analyst. The offer letter clearly sets out the terms of my employment concerning salary and benefits, incentive pay, stock options and savings plans. The

offer letter does not specify a term for length of employment, but clearly references our agreement that the employment contemplated is on a long-term basis.

8. After receiving the offer letter, I telephoned Lloyd Hand in D.C. and communicated my acceptance of TRW's offer. I completed and returned TRW's Application for Employment and physical examination record, and reported for work on April 6, 1981. In addition, as a condition of my continued employment, TRW later required me to sign an Employee Acknowledgement of TRW Code of Business and Ethics Conduct, a Confidential Information Agreement, and a Secrecy Agreement. It was not my understanding, and I was never told that the language "during such time as may be mutually agreeable to the Employer and myself" contained in the Employee Confidential Agreement referred in any way to my term of employment with TRW. Although I was given a copy of TRW's Policy Manual, which is nearly 200 pages long, I did not review it in detail, never read the document in its entirety and was not aware of the sentence which read: "TRW, of course, reserves the right to the extent permitted by applicable law, to terminate any employee at any time." This statement was never pointed out to me or discussed with me ever at any time during my employment with TRW as having any bearing on my career with TRW.

9. To the contrary, based upon the documents I received and my conversations with senior officials at TRW, including then Chairman and CEO Ruben Mettler, TRW agreed that the term of my employment was to be permanent and long-term to the future and that I could be fired only for cause, *i.e.*, if I failed to do my job well or if I engaged in unethical conduct or if the company became economically nonviable. I then began what I believed to be a permanent career with TRW, a career which in fact spanned nearly a decade and was highly acclaimed both inside and outside TRW.

10. My outside activities, including writing, never presented a conflict with my obligations at TRW. The outside activities I engaged in did not lessen my impartiality, judgment, effectiveness or productivity at TRW. My personal interests and the interests of TRW were never in conflict.

11. I worked at TRW for nearly ten years from April 1981 to June 1990. During the course of my employment with TRW, I was given two promotions: in 1984, I was promoted to Director of Policy Analysis and in 1987, I was advanced to Vice President of the Office of Policy Analysis. In 1985, TRW moved its offices from Washington, D.C. to Virginia, but I continued to perform a major portion of my services for TRW from my home office in Washington, D.C. TRW had outfitted my home office in Washington, D.C. with a personal computer. These services included testifying before Congress in Washington, D.C., consultation with the representatives of the Executive Board and representation of TRW at Washington, D.C. seminars and policy discussions. I also often went to Ohio to give seminars and lectures to TRW's senior officers. I also participated in three "restructurings" of TRW's internal corporate structure and, in 1988, personally assisted with the transition of Joseph Gorman ("Gorman") to the position of CEO. During each such transition, the senior officials at TRW, including CEO Gorman, repeatedly told me that I had a guarantee of continued future employment at TRW, that TRW was committed to its public policy function and to me, and that my position at TRW was permanent.

12. During my tenure at TRW and pursuant to TRW's promises to me, I continued to write and publish books and articles on my own time. From 1981-1988, I published more than 200 articles and three books, including *America in Ruins* (1981), *Thinking Strategically* (1984) and *The High Flex Society* (1986).

13. All three books dealt with issues of significance in the public policy arena, including such issues as the decline

of American competitiveness. At no time did any of my supervisors at TRW object to the content of any of my writings or, until the spring of 1990, request any prepublication review. In fact, it was my explicit agreement with TRW that it would *not* review my work pre-publication. TRW stated this posture publicly many times. (*See e.g.*, TRW's Position Statement, attached as Exhibit F to Plaintiff's Opposition to Defendant's Motion for Summary Judgment ("Plaintiff's Opposition")).

14. During my employment with TRW, I was repeatedly given excellent employee evaluations for my work. In February of 1990, ten weeks before I was fired by TRW, I was given a $50,000 bonus for outstanding performance.

15. Well before I ever considered writing the book that became *Agents of Influence* ("Agents"), the issue of foreign investment in the U.S. and foreign influence in the American political system was widely discussed and written about in the public policy arena. Particular emphasis in these writings was given to the issue of Japanese investments in the United States and the "Japanese lobby." As a commentator and analyst of pertinent public policy issues, it was natural that I became increasingly interested in the topic of foreign influence. In early 1988, I began to consider the issue seriously as the topic of my next book.

16. In April 1988, I discussed with then CEO Mettler that I planned to write a book that would focus on foreign political influence. Specifically, I advised Mettler that the proposed book was to be a treatise on foreign, especially Japanese, influence in the American political system and also advised that the book could be controversial. My job was a primary focus of this conversation, and Mettler told me that the book was my individual project and did not have anything to do with TRW, and that I was free to proceed with the project and maintain my position at TRW. I began writing "Agents" in the summer of 1988.

17. On June 19, 1988, *The Washington Post* published an article in its "Outlook" section authored by me which clearly set forth the thesis of "Agents" (*See* Money Talks: How Foreign Firms Buy U.S. Clout," *The Washington Post,* June 19, 1988, a copy of which is attached as Exhibit K to Plaintiff's Opposition). The theme of the article, and subsequently of "Agents," was that as foreign ownership of United States' assets has expanded, foreign owners have sought to protect their investments by hiring former officials of the United States government and other politically powerful individuals to promote, lobby, and publicize their positions. The article also provided specific numerous examples of Japanese "influence peddling" in America. *Id.*

18. On June 20, 1988, I forwarded a copy of *The Washington Post* article to Mettler who then distributed the article to TRW senior management. In late June 1988, following the publication of *The Washington Post* article, Mettler and I had a subsequent telephone conversation about the underlying factual thesis for "Agents," as set forth in the *Post* article, in which I specifically asked him if he had any problems with my going forward on this project. He said "No." Mettler advised me to be sure my facts were accurate and I assured him that I was using Lloyd Hand and the law firm of Verner Liipfert as my lawyer to check the accuracy of the facts in this book. I knew that Mettler had confidence in Hand because he had also served as counsel to TRW and as an aide to Mettler. As stated in these discussions with Mettler, and later with my supervisor Howard Knicely ("Knicely"), it was our agreement that I would be protected against any employment action at TRW if that action was based on the book published as "Agents." Knicely also advised me to be sure my facts were accurate. Neither Mettler nor Knicely ever asked to review the manuscript, said the topic was too controversial or suggested that I write on another topic. If any of my supervisors at TRW had told me that writing "Agents" would have an adverse

effect on my employment, I would have chosen a different topic.

19. From June 1988 through June 1990, the issue of foreign influence peddling by Japan and other countries, the thesis of "Agents," was reviewed and discussed by senior officials of TRW on numerous occasions. For instance, on June 23, 1988, I presented the thesis for the book in portions of a speech before the Bi-Annual Senior Management meeting of TRW. The speech had been preapproved by my then supervisor, Knicely, Vice President for Human Resources. Subsequently, an abstract of the speech was published and widely distributed in the TRW newsletter and in a videotape sent to 2,000 TRW managers. The speech warned of increased involvement by foreign governments, particularly the Japanese, in the American political system and its economic consequences to American companies. TRW executives were very interested and shared my views on the topic of foreign influence.

20. In January 1990, William Oliver requested the opportunity to read the manuscript of "Agents" prepublication. I did not "refuse" his request. Rather, "Agents" was not scheduled to be published until November 1990 and the manuscript was not yet completed. I advised him that any decision by TRW to read the manuscript would violate the agreement with my supervisors for TRW not to pre-review the manuscript, so that TRW could maintain its "deniability" as to my independent work.

21. On February 23, 1990, Bruce Gerding, the head of TRW's Tokyo office, advised me that he found himself "defending your book and TRW" to the speech writer for Akio Morita, the President of Sony. It became clear to me that certain news and business agencies in Japan were overreacting to the perceived criticism, and not to the contents of "Agents," which at that point had not been completed, let alone published.

22 . At the end of February 1990, I met with William Lawrence ("Lawrence"), my recently appointed supervisor at TRW, and discussed the possible impact of "Agents." At no time did Lawrence indicate that TRW had revoked its promise to me that I could write and publish "Agents." He did not advise me that "Agents" might be contrary to TRW's interests nor suggest that "Agents" not be published. Moreover, there was no mention in any manner, of any termination or any adverse impact on my employment at TRW if "Agents" were published.

23. In early 1990, the press in the U.S. and Japan published articles about the forthcoming publication of "Agents." However, I dispute TRW's contention that I was "often" described as a "Japan-basher" or the like, or "invariably identified" in the media as TRW's Vice-President for Policy Analysis. During my tenure at TRW, I regularly appeared on a television talk-show called "Money Politics" and was never identified with TRW.

24. By April 1990, the issue of Japanese media attention had become a major concern for TRW because I was scheduled to give a series of lectures in Japan on behalf of the U.S. State Department on U.S. competitiveness. I had promised, however, not to discuss the issue of foreign influence peddling or "Agents" with the press in Japan. I kept this promise.

25. In April-May, 1990, two significant events took place. First, in April 1990, I learned that a TRW employee, Jerry Myers, had testified before a Commerce Department fact-finding panel on behalf of Honda of North America. The Commerce Department was holding hearings on whether the President should name Japan as an "unfair trader" because its companies were buying so few auto parts from U.S. companies. Myers' testimony suggested that there was no problem. I objected strenuously to John Castellani that (1) TRW had acted as an unregistered foreign agent on behalf of the Japanese auto-

motive industry, and (2) the matter had been kept secret from me even though such policy matters were in my domain at TRW. Second, I was told by Mike Johnson of TRW in May 1990, that the Japanese Defense Agency ("JDA") refused to meet with representatives of TRW in Japan, allegedly because of TRW's connection with me.

26. On or about May 23, 1990, Lawrence told me that my employment with TRW would have to be terminated. Lawrence informed me that TRW decided terminating my employment would be in "the best interests of the Company." I protested strenuously. Although he had not read the manuscript, Lawrence stated that the publication of "Agents" would harm TRW with its Japanese customers. I very much protested the termination to Lawrence as being in violation of all of TRW's promises and commitments to me. I requested that Lawrence and Gorman reconsider the matter. Lawrence asked for and received a copy of the manuscript of "Agents." Prior to May 1990, neither Gorman nor Lawrence had requested a copy of the manuscript of "Agents." Unbeknownst to me at the time, before anyone at TRW ever read the manuscript of "Agents," a plan was underway to fire me because of the perceived negative impact on TRW's Japanese business. I know that Gorman was well aware of my project and the thesis of "Agents" from June 1988.

27. Lawrence and I met on June 7, 1990 at the TRW office in Arlington, Virginia. Lawrence informed me that he had read the manuscript of "Agents," and that it espoused views totally unacceptable for a TRW official. He restated his concern that the Company's business with Japanese companies would suffer as a result of its publication. Lawrence said that he had consulted with Gorman and others and that I was fired. I asked to appeal this decision to Gorman.

28. On June 26, 1990, I met with Gorman and Lawrence at Company headquarters in Cleveland, Ohio. Gor-

man stated that my employment with TRW was terminated. Gorman claimed that TRW had not known the contents of "Agents," and if it had, it would have said you cannot write that and stay at TRW. In fact, TRW had *never* expressed that view to me or to the outside world. If it had, I would have written on another topic. I told Gorman that his action violated every agreement that I had with TRW concerning the terms of my employment and my ability to write and publish my own work independently. Gorman stated again that I had to go. At the time of this meeting, I was still primarily working out of my home in Washington, D.C.

29. Lawrence notified me that my last day at TRW would be on August 15, 1990. In July 1990, Lawrence presented me with a separation agreement ("the agreement"). The agreement offered a one-year consulting contract in the amount of $50,000, with two years of renewable options.

30. On August 13, 1990, TRW informed its employees that I had resigned from the Company. On August 15, 1990, TRW issued a press release which stated that I had resigned from the Company (*See* Exhibit U to Plaintiff's Opposition). The press release also stated that I was instrumental in drawing national attention to America's competitiveness and other issues, and in the words of Gorman, TRW "recognized Dr. Choate's unique capabilities and . . . many contributions to TRW." The press release claimed that I would serve as consultant to TRW. *Time, Newsweek, The Washington Post* and other newspapers became aware of my departure from TRW. These news organizations investigated the circumstances of my departure and published articles stating that I had been forced out of TRW. I refused to comment to any news organization with regard to this issue. I did not release this story to the *Washington Post.* After the *Washington Post* article appeared on August 16, 1990, TRW immediately withdrew its consulting agreement and proffered in

its place an extremely restrictive severance agreement that was unacceptable to me. Because I would not accept TRW's terms and despite my career of nearly 10 years, I was given no severance pay or benefits.

31. Since my termination by TRW, I have sought but have been unable to attain employment with any major U.S. corporation.

32. Further affiant sayeth not.

I hereby swear or affirm that the foregoing facts are true and correct to the best of my knowledge.

/s/ Pat Choate
PAT CHOATE

Signed and sworn before me this 15th day of April, 1992.

/s/ Susan L. Hibbard
Notary Public

My Commission Expires: 4/30/93

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C. A. No. 91-1719

PAT CHOATE,

Plaintiff,

VS.

T.R.W., INC.,

Defendant.

Washington, D.C.—May 20, 1992

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE THOMAS P. JACKSON

---

* * * *

[41] Now, if the Court is intending to consider the issue of just cause in a summary judgment posture, this record has not been developed from a discovery standpoint on that issue.

Under anybody's theory, the existence of arbitrary-or-capricious reasoning, if you will—not just by Mr. Gorman, but within the management—who talked to who about what and what were the real motivations relative to Dr. Choate's termination—?

THE COURT: I think the record is fairly complete about that. The sense that I got is that, right or wrong in his thesis, Choate's presence as a member of senior management of T.R.W. was distinctly disquieting to T.R.W.

in view of its desire to be looked upon favorably by potential sources of profit in Japan.

MR. COOTER: That's assuming that you accept as one hundred percent true—and there is a lot of question about a lot of what has happened here—the stated reasoning of Mr. Gorman in that regard.

There are tons of memos, for instance, about which we haven't been able to question anybody, because Mr. Gorman didn't see them and Dr. Mettler was out of the company, that would easily suggest a pretermination animus to Dr. Choate, which didn't have anything to do with any legitimate business concern of Mr. Gorman.

[42] Frankly, Mr. Gorman's motivations in connection with some of his personal involvements—organizational and otherwise—would lead one to suspect that conclusion.

And all I am saying is if the Court intends to deal with that at a summary judgment stage, I would like an opportunity to develop a record on that issue.

THE COURT: Well, I don't know who you have inquired of in that regard, or why you haven't inquired in that regard.

You're coming up on a trial date on August 31st of this year. The only depositions you indicated that you wished to take further were depositions in Japan.

MR. COOTER: No, sir. With every deference, no, sir. I don't mean to argue with the Court.

We agreed, given the position of T.R.W.—I think I agreed to it. If I didn't it wouldn't matter, because you ordered it.

THE COURT: You agreed to forbear from taking depositions in Japan. But that was what we were concerned with the last time you were here.

MR. COOTER: Judge Jackson, let me see if I can refresh your recollection. What happened was at the second status conference, because they said, "We can demonstrate on three depositions, in effect, T.R.W. never said any such thing to Pat Choate." I agreed, and you ordered, I [43] believe—but I agreed that the depositions would be

Choate, Mettler, Gorman, and summary judgment. That they would go forward on that basis.

We noticed a number of depositions of high-level T.R.W. employees, most of which were here. By here, I mean in the United States, and I want to say the majority of which were probably Cleveland. But I don't have my list here.

And the Court will recall that T.R.W. asked for a discovery conference to stay all discovery. Within that list there were two or three—maybe three, but I believe two of the fifteen were T.R.W. officials in the Tokyo office.

And the Court will recall as to the issue of the deposition of Japanese nationals—I hope the Court will recall—that I said that I had learned that the deposition procedure in Japan, letters rogatory and the way in which depositions were conducted, was so unsatisfactory from our standpoint that I didn't want to do them. I didn't wanted to go to Japan for that purpose, and that left us with, on the whole list of deponents, only two, both of which, as I recall it—and one of which—I know Mr. Rubin, who managed the T.R.W. office, and I presumed him to be an American national and a current T.R.W. employee, and the other one, I can't recall whether he had a Japanese name or [44] an American name. But the reason I haven't made this inquiry is because you stated—you ordered that we not proceed with any further discovery at all until such time as you ruled on summary judgment.

Actually, what you said in Chambers, as I recall it, was, "you're stayed until May 10th, or when I rule on summary judgment. I will try and rule by May 10th." I said, "Okay. Fine. We're stayed until May 10th."

THE COURT: I didn't tell you that you were stayed, because I don't rule in Chambers. What I do is tell you what I think ought to be done, and I give you an opportunity to come out and go on the record if you oppose that.

So if we didn't come out and go on the record, then it means that you acceded to whatever it is I suggested.

MR. COOTER: That's true. You said, "This is how I think it should be done. Do you want to bring a court reporter in"? I said, "Judge Jackson, if that's what you think should be done, it's not necessary."

But in response to what the court said, that I didn't take these depositions, I mean it's because that's what you indicated should be done. And I went along.

THE COURT: You're telling me you haven't asked anybody, whose deposition you have taken, from T.R.W., about [45] why it was that they really got rid of Pat Choate?

MR. COOTER: Other than Joe Gorman, who is the only person that I have been able to—who is actually presently in service.

Dr. Mettler and Mr. Gorman are the only people we have deposed. Dr. Mettler had retired.

Dr. Mettler, other than a conversation with somebody he didn't know, and Mr. Gorman gave me his three stated reasons. And beyond that, I was never able to inquire as to the others, on whom we have got all of these memos, as to what was really going on here.

THE COURT: Okay.

MR. COOTER: At this point, does the court want us to brief this cause issue? I am happy to do it.

THE COURT: Let me hear what Mr. Kramer has to say.

MR. KRAMER: Thank you, your Honor.

First, with respect to *Hodge* controlling, you Honor, I would note that the D.C. Circuit, subsequent to the *Hodge* case, in a case called *A.T.T. v. Fleming,* affirmed the direction of a dismissal of a complaint in an employment-at-will case, where the District Court in this district relied on *Minihan.*

And we have cited that to the court in our brief.

Mr. Cooter indicated that *Hodge* was controlling in [46] the circuit.

Shankle v. D.R.G. is a decision by Judge Sporkin, also cited in our brief, subsequent to the *Hodge* opinion,

also relying on the *Minihan* decision. It was not, to my knowledge anyway, appealed.

I would note one other major distinction between this case and *Hodge* and *Riefkin.* In neither *Hodge* or *Riefkin* was there an employment manual which clearly reserved the employer's right to terminate an employee at-will, as shown as exists here.

Let me briefly go to the question about cause. I was confused really as to the colloquy, because when you asked, not at the Court's question to Mr. Cooter about cause, but when you asked, "What constitutes cause"? I was somewhat confused because the plaintiff in his affidavit and in their brief now set out what is just cause in their view. And it's only three reasons, your Honor.

They said there was agreement by T.R.W. to terminate the plaintiff for only one of three reasons. Either he didn't perform his job well. Maybe that assumes physical —I am not sure—but perform well. If he engaged in unethical conduct or if the company was nonviable.

That's the definition of just cause from the plaintiff.

* * * *

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 91-1719-TPJ

PAT CHOATE,

Plaintiff,

v.

TRW, INC.,

Defendant.

Washington, D.C.—Wednesday, October 30, 1991

DEPOSITION OF PAT CHOATE

* * * *

[90] Q Was there any reference by you in these conversations—

A Nothing different than what I wrote.

Q Was there anything said in these conversations with respect to that one country was particularly more egregious in how this was occurring than another country or other countries?

A Well, I certainly made the point that the Japanese were doing it extensively. I mean, they were, after all, our both principal competitor and principal market opportunity in the circumstance. The whole of the MOSS Talks around the Japanese.

Q Was your—

A But I also made the point that other countries were engaged in these activities as well.

Q You then indicated that in the spring of 1988, you had a further conversation with Dr. Mettler, as you put it, on thinking about this book.

A Yes.

Q Would you describe that conversation, where it was and what was said, please?

A It was by telephone. I think he was probably in [91] Los Angeles. What would happen is from time to time he and I would have very extended telephone calls. This was one such cail. I related to him that I was thinking about my next book. One of the topics that I was thinking about was a book on—that I called Tailored Trade. I had done a piece in the Harvard Business Review, which had been published in January. I was very intrigued in that topic.

My policy analyst research assistant had just done a piece called American Assets or it was coming out and she was still working on it about foreign investment, with a heavy emphasis on Japanese investment inside the United States. I was thinking on Agents of Influence. I could either do it as a book or I could do Tailored Trade or I could do Agents of Influence as a monograph, a short piece or I could do it as a full long piece or I could not do it all.

So, I had a chat with him on the topics, as I had done with other topics and books seeking—I was seeking his reaction. If there were any negative reactions, I wanted to know them. There were not. He thought it was a very good topic. He offered me a piece of very good advice, which he gave to me again several other times, and [92] that advice was that given the nature of a book such as this, and given the fact that I intend to name specific people doing specific things, taking and dealing with specific amounts of money, that I had to take every precaution if I did that book, to make sure there wasn't a single error because if there were a single error, the people that I would be writing about and their friends would use that as an attempt to discredit the whole book.

The conclusion of that conversation was that I could write the book, that he had no objections to me writing the book and that I would suffer no subsequent retribution for writing the book. It was reconfirmed in a conversation in June or early July—

Q Excuse me, Pat. Before leaving that conversation —and I am perfectly willing and want you to get into—

A However you wish.

Q How did you describe in this particular conversation the thesis for your book, Agents of Influence?

A Almost precisely in the terms of what became the article, the Business Outlook section article.

Q Would you describe—I mean, it was an oral conversation. Would you describe for us here to the best [93] of your recollection what you explained that thesis to be to Dr. Mettler?

A It would be about foreign influence. It would have specific examples. It would deal with lobbying. It would deal with politicking. It would deal with grass roots activities. It would be Japanese penetration of our think tanks and lobbying organizations, that it would name specific organizations, specific actions and specific amounts of money.

Q You indicated that you came away from the conversation with your knowledge or your thought that there would be no retribution against you in writing this book.

A That was my understanding.

Q When you say that is your understanding, what exactly did Dr. Mettler say to convey that understanding, please?

A He said, "I think it is a wonderful title and I think it will be a useful contribution." I asked him did he have any difficulties with it and he said "no," and this was in the same style and trend that we had on our other books and the understanding, very clearly, between the two of us is I could write this book, as I had done in my other [94] books. It would be my statement and that it would have no adverse effect on my employment.

Q When did you reach that original understanding, that you could write these books, that it goes back to earlier—

A With Lloyd Hand.

Q With Lloyd Hand.

A And with Tom Fay and with Howard Knicely and I had talked with Mettler about other of my books and

writings, before I was doing it. Certain of the important statements that I would be making, I would circulate those to Mettler for comment ahead of time. I tried to be responsible and sensitive.

Q Did you send to Dr. Mettler the final proposal that you sent to your publisher for the Agents of Influence?

A No. What I sent to Dr. Mettler was The Washington Post Outlook piece, which is—which easily could, I think, have been the forward to the book because it telegraphs the whole of the book. And I also sent copies of that to Joe Gorman and to Howard Knicely.

* * * *

[97] Q You indicated that this article generated another conversation with Dr. Mettler.

A It did.

Q Would you describe that conversation please?

A Dr. Mettler, a couple of weeks after the article, called me and said that he had a conversation with someone in Washington, who had objections to the article. He asked was I confident of my facts in this article. I told him I was quite confident and that Lloyd Hand and Verner Lipfert had reviewed this article for accuracy, facts, everything and thought it was just fine.

* * * *

[150] Q Now, you had a subsequent conversation, which is I take it after he read the manuscript. He called up and said I want to see you again. It that sort of the way that meeting came about?

A Yes.

Q You said that meeting took place in Washington?

A Yes.

Q Again, is that approximately some time in May?

A May or early June, somewhere in there.

Q What was said at this meeting? And again, is this just the two of you?

A Just the two of us.

That the book is totally unacceptable, that it will do enormous harm with TRW's efforts in Japan, that it will cost sales, that I have to go.

* * * *

[154] Q Was it your understanding that your discussion, discussions, with Dr. Mettler and then also, as you say, Howard Knicely would protect you against any employment action at TRW if that action was based on the book published as Agents of Influence?

A Of course.

Q And that regardless of its impact at TRW, that no employment action would be taken against you?

A Correct.

Q And that was a stated or unstated assumption of your discussion, for example, with Dr. Mettler?

A That was the stated assumption. It was certainly the basis of the conversation with Dr. Mettler. I just as easily could have chosen a different topic.

MR. COOTER: For the book?

THE WITNESS: Yes, about the book. It was not only my understanding, it was my agreement with TRW that I could write this book, do it on my own time; in fact, was [155] given repeated corporate leaves of absence, without pay, to write this book, and that when the book was published, that it would have no adverse effect upon my employment, my relationship with TRW.

That is the promise that TRW made me.

BY MR. KRAMER:

Q And that was made to you, I take it—

A That is the whole purpose of these conversations.

Q —in conversation that you had starting in April of 1988 with Dr. Mettler, when you went to him about the ideas for a potential book.

A It is the whole series of promises that go from 1981, when I joined the company, that as an author I could write outside books, and there is reaffirmation of this and

there was a specific clearance on this specific book and then a reaffirmation of that roughly, oh, whatever the time period is from the spring until the middle of the summer 1988.

* * * *

[160] MR. KRAMER: Off the record for a minute.

(Discussion off the record.)

BY MR. KRAMER:

Q Those are the two reasons then why you would not think it—

In terms of your next meeting with Bill Lawrence and Joe Gorman, that took place in Cleveland?

A Correct.

Q Beside those two, was anyone else present?

A No.

Q What was said and by whom at that meeting concerning your employment status at TRW?

A Bill Lawrence and I met with Gorman in his conference room. Gorman came in and opened the conversation by saying "I regret that we have to meet under these kinds of circumstances, but they are what they are."

* * * *